BRIDGEWATER ROLLER MILLS CO. v. STROUGH, GUARDIAN.*

Supreme Court of Appeals: At Richmond.

December 6, 1900.

Absent, *Phlegar*, J.

1. DEEDS OF TRUST—*Subsequent alienations by grantor—Release of part by trust creditor—Notice.* Ordinarily, when the equities of the various owners of land subject to a deed of trust are unequal, so that their respective parcels are liable in the inverse order of alienation, if the deed of trust creditor, having notice of this situation, releases a parcel which is primarily liable, he thereby discharges or releases those parcels which are subsequently liable in the order of their several liabilities from an amount of the deed of trust debt equal to the value of the parcel released.
2. DEEDS—*Recordation—Effect on prior purchaser—Notice.* The registry of a deed by a subsequent purchaser is no notice to parties who have acquired their rights before the time when the deed is registered.
3. DEED OF TRUST—*Subsequent alienation by grantor—Notice.* To affect a prior mortgagee with notice of a subsequent deed made by the mortgagor, actual notice to the mortgagee must be shown, and the proof must be such as affects his conscience. It is not sufficient if it merely puts him upon enquiry. It must be so strong and clear as to fix upon him the imputation of *mala fides*.

Appeal from a decree of the Circuit Court of Rockingham county, pronounced in the chancery causes of *Strough, Guardian*, v. *Berlin and others*, and *Berlin's Creditors* v. *Berlin's Adm'r and others*, heard together. *Affirmed.*

The opinion states the case.

W. Liggett, O. B. Roller & Martz, and *Yancey & Haas*, for appellant.

Sipe & Harris, for appellee.

CARDWELL, J., delivered the opinion of the court.

This case is as follows: George W. Berlin was the owner of two properties at Berlinton, near Bridgewater, in Rockingham county, one, his place of residence, spoken of in the record as "The Mansion House" property, and the other as the "Mills" property. By deed dated December 22, 1890, both of these properties were conveyed by George W. Berlin to Samuel L. Slusser, trustee, to secure Susan C. Strough, as guardian for her children, the payment of a bond in the

* Reported by M. P. Burks, State Reporter.

sum of $2,136, executed to her by George W. Berlin for borrowed money. By deed dated May 29, 1893, George W. Berlin, for the recited consideration of $5,000, conveyed a one-half interest in the "Mills" property to E. L. Berlin, his son. On August 31, 1893, George W. Berlin and E. L. Berlin conveyed the "Mills" property to "The Bridge Water Roller Mills Co.," for the recited consideration of $12,000. March 15, 1894, George W. Berlin conveyed "The Mansion House" property (which he still retained, subject only to Mrs. Strough's deed of trust) to William L. Yancey, trustee, to secure to the Baltimore Building and Loan Association the payment of a loan of $2,000, at the time made to him, and Mrs. Strough, guardian, in consideration of the payment to her, as a credit upon the debt due her by George W. Berlin, of $500 out of the money loaned to him by the B. B. and L. Ass'n, joined in this deed, for the purpose, as expressed in the deed, of making her said deed of trust of December 22, 1890, as to the "Mansion House" property, subordinate and inferior to the lien created by this deed on the "Mansion House" property in favor of the B. B. and L. Ass'n, "for this purpose and no other." May 14, 1894, "The Bridge Water Roller Mills Co." conveyed the "Mills" property, now spoken of as "The Bridge Water Roller Mills" property, conveyed to it by George W. and E. L. Berlin, to William L. Yancey, trustee, to secure the B. B. and L. Association the payment of a loan of $2,000, at that time made to "The Bridge Water Roller Mills Co." All of the above mentioned deeds were duly admitted to record. George W. Berlin died in November, 1895, and shortly thereafter a suit was brought in the Circuit Court of Rockingham county, styled *Geo. W. Berlin's Crs.* v. *Geo. W. Berlin's Adm'r, &c.*, for the purpose of settling up his estate, which was insolvent. Subsequently Mrs. Strough, as guardian for her children, filed her original and amended bill, in the same court, against the same defendants as in the first named suit and "The Bridge Water Roller Mills Co." to subject "The Bridge Water Roller Mills" property to the payment of the balance due the complainant upon the debt secured to her by the deed of December 22, 1890, to Samuel L. Slusser, trustee, the "Mansion House" property having been sold for not more than enough to pay the debt of the Baltimore Building and Loan Association. In this suit there was a decree of reference, in which a number of inquiries were directed to be made by the commissioner covering all the questions raised by the bills and answers. The commissioner to whom the cause was referred reported that the lien of Mrs. Strough,

guardian, on "The Bridge Water Roller Mills" property, under the deed to Samuel L. Slusser, trustee, of December 22, 1890, was superior to that of the deed to William L. Yancey, trustee, of May 14, 1894, securing the B. B. and L. Ass'n the debt of $2,500 borrowed from it by "The Bridge Water Roller Mills Co.;" and that as Mrs. Strough, guardian, did not have actual notice of the conveyance from George W. Berlin to E. L. Berlin, or of the conveyance from George W. and E. L. Berlin to "The Bridge Water Roller Mills Co.," recorded respectively September 14 and 16, 1893, her lien was also binding upon the mill property in the hands of "The Bridge Water Roller Mills Co.," and superior to any rights it had in the property. Upon the hearing of the two causes of *Susan C. Strough, Guardian*, v. *Berlin, &c.*, and of *G. W. Berlin's Crs.* v. *Berlin's Adm'r, &c.*, the Circuit Court decreed that Mrs. Strough had no such notice of the alleged rights of the Baltimore Building and Loan Association, or of "The Bridge Water Roller Mills Co.," or of E. L. Berlin, under whom it claimed, at the time she executed the release on the "Mansion House" property, as would by virtue of her release thereof subordinate her lien either to that of the B. B. and L. Ass'n, or to the rights of those through whom it claimed, on the Mill property, confirmed the report of the commissioner in so far as it gave priority to the rights of Mrs. Strough over the B. B. and L. Ass'n and E. L. Berlin and of "The Bridge Water Roller Mills Co.," and directed a sale of the mill property to satisfy the liens thereon.

From this decree "The Bridge Water Roller Mills Co." obtained an appeal to this Court.

"Ordinarily, when the equities of the various owners of lands subject to a deed of trust are unequal, so that their respective parcels are liable, in the inverse order of the alienation, if the deed of trust creditor, having notice of this situation, releases a parcel which is primarily liable, he thereby discharges or releases those parcels which are subsequently liable in the order of their several liabilities from an amount of the deed of trust debt equal to the value of the parcel released. But this effect of the release may be obviated by the conduct of the parties to be affected." 3 Pom. Eq., sec. 1226; *Building Ass'n* v. *Fellers*, 96 Va. 337.

"It is," says Mr. Pomeroy (Pom. Eq., *supra*), section 657, "a fundamental proposition, therefore, established with complete unanimity, that a registration properly made does not operate as constructive notice to all the world, but only to those persons who, under

the policy of the legislation, are compelled to search the records in order to protect their own interests. It is equally well settled that such record is not notice to the holders of antecedent rights—that is, to those who have acquired their rights before the time when the record is made—and this is so even when the antecedent right may, in pursuance of the statute, be defeated by the fact of the prior record. In other words, the registration of an instrument does not act *as a notice* backwards in time."

In *Building Ass'n* v. *Fellers, supra,* the opinion by Buchanan, J., says, that while the question had never been passed upon by this court, it is well settled, both upon principle and authority, that the registry of a deed by a subsequent purchaser is no notice to parties who have acquired their rights before the time when the deed is registered. Neither the language nor the policy of the registry acts was intended to affect the holders of antecedent rights, but only such persons as are compelled to search the records in order to protect their own interests.

It is clear, therefore, that the rights of Mrs. Strough, guardian, were in no way affected by constructive notice arising out of the recordation of the conveyance of a one-half interest in the "Mills" property by George W. Berlin to E. L. Berlin, or of the conveyance by George W. and E. L. Berlin of the "Mills" property to "The Bridge Water Roller Mills Co."

The remaining question of importance, and the only one that we need consider, is, did Mrs. Strough, guardian, have actual notice of the conveyance by George W. Berlin to E. L. Berlin, or of George W. and E. L. Berlin to "The Bridge Water Roller Mills Co.," admitted to record in September, 1893?

Sheldon, in his work on Subrogation, section 81, citing a number of authorities in support of the text, says: "That a mortgagee is not bound to take notice of subsequent liens or conveyances, or of litigation which arises concerning them; and subsequent purchasers of portions of the mortgaged premises who desire him to act with reference to the order of subsequent alienations by the mortgagor, must notify him of the fact in proper time, and request him to act accordingly. . . . If a release of a part of the mortgaged premises was given without notice of the equities of the subsequent incumbrancer or grantee, the first mortgagee who gave it is not responsible for the consequences of his act, nor is the lien of his mortgage upon the unreleased portion of the premises in any wise impaired thereby." . . .

There is not the slightest pretence in this case that any such action

was taken by E. L. Berlin or "The Bridge Water Roller Mills Co.," and there is no proof whatever that E. L. Berlin or "The Bridge Water Mills Co." notified Mrs. Strough at any time of their respective purchases. The reliance to establish *actual notice* to Mrs. Strough of the conveyance from George W. Berlin to E. L. Berlin and of George W. and E. L. Berlin to appellant, "The Bridge Water Roller Mills Co.," rests solely upon the following facts and circumstances, claimed to have been proven—to-wit:

"1st. Mrs. Strough lived within a quarter of a mile of the mill, and not only was the Milling Company in open and notorious possession of the property, but its acquisition of the title and possession marked a new departure in the business conducted there, the property being converted from a bone mill into a roller process flouring mill, many improvements being made, and much new machinery being placed in the mill."

"2d. Mrs. Strough dealt at the mill after it was converted into a flour mill, and ran an account there, buying flour and other supplies, the sacks containing the flour she bought bearing the stamp of the Bridge Water Roller Mills Company, as did also the stationery of the company on which its bills were rendered."

"3d. The *Bridgewater Herald*, a newspaper published at Bridgewater by G. R. Berlin (son of George W. Berlin) and a stockholder of the company, contained conspicuous advertisements of the Milling Company, and Mrs. Strough was a subscriber for this paper, and her son, who lived with her, worked in the printing office where it was printed and assisted in printing them, as he also assisted in the work of printing the stationery of the company."

"4th. Mrs. Strough, according to the testimony of G. R. Berlin (a son of George W. Berlin), corroborated by J. W. Click, first called as a witness for Mrs. Strough, was approached in the presence of the witness in the fall of 1893, by his father, and asked to take stock in the Milling Company."

"5th. The deed of March 15, 1894, by which Mrs. Strough subordinated her lien on the "Mansion House" property to that of the Building and Loan Association, described the Mansion House property so released, as adjoining the properties of Henry Cromer's estate, John Thuma, P. W. Roller, and the *Bridge Water Roller Mills Co.*"

We shall not attempt to review the evidence in detail, which it is claimed establishes the foregoing facts and circumstances, for, leaving out of view, as did the Circuit Court, the statement of Mrs. Strough

denying that she had any sort of notice of a change of the title to the "Mills" property before or at the time she united in the deed of trust given by George W. Berlin to Yancey, trustee, March 15, 1894, to subordinate her prior lien on the "Mansion House" property to that of the Baltimore Building and Loan Association for the loan it then made to George W. Berlin, and also the evidence going to show that Mrs. Strough is an "unlettered woman," we are of opinion that it may be conceded that all the foregoing facts and circumstances, relied on by appellants, are shown by the evidence, still this character of notice is not within the definition of the law as to what constitutes actual notice in such cases.

"Proof of actual notice must be such as affects the conscience of the party sought to be charged with such notice, and is not sufficient if it merely puts him upon inquiry, but must be so strong and clear as to fix upon him the imputation of *mala fides.*" *Mundy* v. *Vawter*, 3 Gratt. 520; *Horde* v. *Colbert*, 28 Gratt. 58; *Newberry* v. *Bank of Princeton*, 98 Va., 2 Va. Sup. Ct. Rep. 407; *Ferguson* v. *Daughtrey*, 94 Va. 308; *Fisher* v. *Lee*, 98 Va., 2 Sup. Ct. Rep. 156.

The proof of this case utterly fails to show that Mrs. Strough had actual notice of the equities claimed by appellants when she united in the deed of March 15, 1894.

What we have already said disposes of the cross error assigned by appellant, "The Bridge Water Roller Mills Co."

The decree appealed from is affirmed. *Affirmed.*

NOTE.—This case involves a nice question of equity jurisprudence, and the decision of the court seems right.

The essential facts may be synoptically stated thus, in the order in which they occurred:

A has a lien on Black-acre and White-acre.

B buys White-acre.

C takes a lien on Black-acre, A agreeing to waive her first lien on that tract, in C's favor.

All these transactions are duly recorded.

A waived first lien on Black-acre, without actual notice of B's purchase, though the latter's deed was recorded.

C's first lien absorbed Black-acre.

The contest was, therefore, between A, claiming her original first lien on White-acre, and B, the purchaser of that tract, claiming that when he first purchased White-acre, he was entitled to insist that A should first exhaust Blackacre, before enforcing her lien against White-acre; and that having voluntarily released her lien against Black-acre, her lien against White-acre should be credited with the

value of the lien so released, so far as might be necessary to protect his ownership of White-acre.

This was an undoubted equity of B's, provided only A acted with notice of B's rights. See the general subject of marshalling discussed 2 Va. Law Reg. 701.

The court held that recordation of B's deed of conveyance was not notice to the prior lienor A, of B's equity of marshalling—thereby affirming the principle laid down in *Hulvey* v. *Hulvey*, 92 Va. 182, 187, and *Lynchburg etc. Co.* v. *Fellers*, 96 Va. 337, 4 Va. Law Reg. 514, that registry of a deed is not notice to "all the world," but only to those whom the policy of the law requires to search the records for the protection of their own interests. See further on this subject, 3 Va. Law Reg. 468; 6 Id. 58.

A question akin to this, is whether one to whom another has executed a mortgage or deed of trust to secure future advances, is charged with notice of a subsequently recorded lien, so as to postpone in favor of the latter lien, his claim for advances thereafter made. Where the first lienor has bound himself to make the advances to a named limit, on principle the question of notice is immaterial, since he may continue to make advancements in pursuance of his contract, despite actual notice of the subsequent lien. Where, however, the advances are not obligatory, the question of notice becomes important. The authorities are not harmonious—the majority maintaining that registry of the subsequent lien is not notice to the first incumbrancer, but he may continue the advances until he receives actual notice.

The cases of *Alexandria etc. Bank* v. *Thomas*, 29 Gratt. 483, and *Didier* v. *Patterson*, 93 Va. 534, involved the subject of mortgages to secure future advances, but not the question of the effect thereon of registry of a subsequent lien. The latter question is discussed with great learning by Corliss, C. J., in *Union Bank* v. *Milburn etc. Co.* (S. D.), 73 N. W. 527. See also Jones on Mortgages, 364–378; note to *Divver* v. *McLaughlin* (N. Y.), 20 Am. Dec. 658–663; *Tapia* v. *Demartini*, 77 Cal. 383, 11 Am. St. Rep. 288 and note; 3 Va. Law Reg. 834.

CAMPBELL v. EASTERN BUILDING & LOAN ASSOCIATION.*

Supreme Court of Appeals: At Richmond.

December 6, 1900.

1. BUILDING ASSOCIATIONS—*Fixed period for maturity of stock.* Under the laws of New York, which govern this case, a mutual building association does not possess the power to issue a certificate specifying a fixed period of maturity of its stock. Such a clause in the certificate must be construed as an estimated period of maturity, and the stockholder is only entitled to receive what his stock has actually earned.

2. BUILDING ASSOCIATIONS—*Shareholder—Fixed period of maturity—Borrower.* A shareholder in a mutual building association is bound by its articles and by-laws, and, having united in a business venture for the common benefit, cannot

*Reported by M. P. Burks, State Reporter.